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November 16, 1998

Ex Parte

Magalie Roman Salas
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Docket CCB/CPD 97-30 and CC Docket No. 96-98, Reciprocal
Compensation

Dear Ms. Salas:

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its comments on the October 28, 1998, ex parte filing of Bell Atlantic in the above-captioned dockets. In its filing, Bell Atlantic addressed the question of "whether the FCC can adopt an interpretation of its prior orders that applies prospectively only." Bell Atlantic asserts that "[t]he answer is yes," and submits "legal authorities" purporting to support this assertion.

This question arises in the context of the controversy surrounding the application of reciprocal compensation to communications that originate on the network facilities of one local exchange carrier ("LEC") and are connected to the Internet through an Internet Service Provider ("ISP") that receives local exchange service from a second LEC. The Commission recently determined that such ISP Internet communications are jurisdictionally interstate "communication[s] by wire" on an end-to-end basis. Specifically, the Commission concluded that such communications "do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often a distant Internet website accessed by the end user ...

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We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site."^{1/}

Although the Commission limited its ruling to the specific high-speed dedicated Internet access service arrangement before it, its jurisdictional finding necessarily applies with equal force to all ISP Internet traffic, including ISP Internet communications that occur over circuit-switched, dial-up connections. Indeed, the FCC based its conclusion that it has end-to-end jurisdiction over the ISP Internet traffic at issue in the GTE ADSL tariff proceeding on precedents that relate specifically to circuit-switched, dial-up services and traffic.^{2/}

Bell Atlantic appears to suggest in its ex parte filing that with respect to ISP Internet communications that take place over circuit-switched, dial-up connections, the Commission may declare that its finding that such communications are interstate traffic "applies prospectively only." Presumably, the purpose of such a declaration would be to attempt to shield past state commission orders requiring incumbent LECs to pay reciprocal compensation for ISP Internet traffic from court review -- specifically, those state orders that were based on the erroneous conclusion that ISP Internet traffic is "local traffic" that "terminates" at the ISP.

BellSouth wishes to correct the record on the question of whether the Commission may apply its finding regarding the jurisdictional nature of ISP Internet traffic "on a prospective basis only." No legal basis exists for the Commission to do so, and the "legal authorities" cited by Bell Atlantic are irrelevant and provide no support whatsoever for Bell Atlantic's assertion.

^{1/} See *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion Order, CC Docket No. 98-79 (rel. Oct. 30, 1998) at ¶¶ 19-20 ("*GTE ADSL Tariff Order*").

^{2/} See, e.g., *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (adopting "enhanced service provider" exemption); *Southwestern Bell Telephone Co.*, Order Designating Issues for Investigation, 3 FCC Rcd 2339 (1988); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 FCC Rcd 1619 (1992); and *Teleconnect Co. v. Bell Telephone Co. of Pennsylvania et al.*, 10 FCC Rcd 1626 (1995), *aff'd*, *Southwestern bell Telephone Co. v. FCC*, No. 95-119 (D.C. Cir., June 27, 1997). Jurisdiction is not affected by the type of services involved, such as circuit-switched, packet switched or dedicated any more than it is affected by the technology used to provide such services, i.e., analog or digital facilities.

In the *GTE ADSL Tariff Order*, the FCC confirmed that under long-established Commission rules and precedent, as well as court precedents, ISP Internet communications are and always have been jurisdictionally interstate communications. It neither adopted nor modified any rule. It corrected no previous interpretive ruling regarding its rules. It simply reaffirmed existing law.

Moreover, as discussed in the attached document, the legal authorities cited by Bell Atlantic all concern cases where an agency modified a rule or reversed a previous interpretation of a rule. In such instances, agencies may have the discretion -- and in some instances, may be required -- to apply the new rule or interpretation on a prospective basis only. But these cases have no bearing on or relevance to the present circumstance, where the Commission has modified no rule or interpretation of a rule, but rather has confirmed the applicability of a well-established rule in a manner entirely consistent with all past interpretations of the rule.

More generally, Bell Atlantic's ex parte finding raises several basic questions: First, whether the FCC may adopt a rule, policy or directive of general application regarding the implications of its finding that ISP Internet traffic is interstate traffic for past or future state commission decisions regarding the application of reciprocal compensation to such traffic. Under current law, the answer is no. Under the statutory framework established by Congress in the Telecommunications Act of 1996, the FCC may not review, approve, disapprove, or otherwise exercise any authority over state commission decisions approving or disapproving interconnection agreements; state arbitration decisions; or state commission orders resolving interconnection disputes between LECs. Consistent with this framework, the FCC has no authority to review, hear appeals from, or issue directives regarding past state commission decisions on the application of reciprocal compensation to ISP Internet traffic.

It should be noted that even if the Commission had authority to determine the impact its finding should have on past or future state commission rulings, a uniform FCC policy or declaration on the matter would be entirely inappropriate. The numerous state commission rulings on the applicability of reciprocal compensation to ISP Internet traffic differ substantially one from another, and are based on different factual and legal predicates. It would be inherently unsound for the FCC to issue a blanket pronouncement on the merits of these decisions.

In some instances, a state commission may have concluded that the parties agreed, as a voluntary contractual matter, to pay reciprocal compensation for the exchange of ISP Internet traffic, irrespective of the jurisdictional nature of the traffic or whether it originates or terminates in the same local exchange. That is, the state commission may have limited its inquiry to the express terms of the interconnection agreement. In such cases, the FCC's determination regarding the jurisdictional nature of the traffic would be wholly irrelevant, as would any attempt by the Commission to determine the impact its finding should have on the state commission rulings.

The second basic question inherent in the matters raised by Bell Atlantic is whether the Commission has any authority to correct state commission rulings that require incumbent LECs to pay reciprocal compensation for ISP traffic based on an erroneous finding that such traffic is "local" because it "terminates" at the ISP. The Commission's *GTE ADSL Tariff Order* definitively rejects all theories that ISP Internet traffic terminates at the ISP. Nonetheless, the Communications Act assigns no affirmative role to the FCC in correcting the state commissions' errors on this matter. It is the Commission's role, in the first instance, to determine the jurisdictional nature of the traffic. But that is where its role ends. It is now up to the state commissions themselves to correct their past rulings, or to the federal courts if the state commissions fail to do so.

Finally, Bell Atlantic's filing raises the question of whether the FCC has the power under the Communications Act to delegate to the states ratemaking authority over ISP Internet traffic, notwithstanding the fact that it is jurisdictionally interstate. The answer is that if the FCC has that power (a matter on which we express no opinion), it may only exercise it in a manner consistent with the Communications Act and the requirements of the Administrative Procedures Act. Specifically, it must proceed by rulemaking, which, by definition, is a statement of "future" effect. The Commission has not initiated a rulemaking proposing to grant the states authority to require the payment of reciprocal compensation for ISP Internet traffic or other interstate traffic. Even if the Commission initiated such a proceeding, it would be barred from giving the states authority retroactively to require the payment of reciprocal compensation for traffic exchanged prior to the adoption of the rule.

None of the cases cited by Bell Atlantic in any way stands for the proposition that the FCC may engage in the retroactive delegation of jurisdictional authority. None of these cases even addresses this issue. Yet that is Bell Atlantic's apparent intent in theorizing that the Commission may declare that its finding confirming that ISP Internet traffic is jurisdictionally interstate "applies prospectively only." By citing irrelevant and inapposite cases in support of this legally untenable theory, Bell Atlantic is simply pandering to the Commission's desire to find a mechanism for subsidizing the CLEC industry.

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If it would advance Bell Atlantic's other interests to agree retroactively to subsidize its competitors, then Bell Atlantic should be free to do so. That should be a matter between Bell Atlantic and its shareholders. However, there is no legal basis for the Commission to burden other LECs that do not wish to subsidize their competitors, by seeking to require them, as a matter of law or regulation, to pay reciprocal compensation for interstate traffic for any time period.

Sincerely,

A handwritten signature in cursive script that reads "Richard M. Sbaratta" followed by a stylized flourish.

Richard M. Sbaratta
General Attorney, BellSouth Corporation

Attachment

cc: Chairman William E. Kennard
Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Chris Wright
Larry Strickling
Jim Schlichting
Tamara Priess

The Cases Cited By Bell Atlantic Are Off-Point

In a document attached to Bell Atlantic's October 28, 1998 *ex parte* filing, titled "Prospective Application of Agency Interpretations," Bell Atlantic cites several cases in support of the proposition that "the courts have long recognized that federal agencies have discretion to limit interpretive rulings adopted in agency adjudications to prospective application."

However, the cases cited by Bell Atlantic apply only to the exercise of discretion by agencies where new rules or new interpretations change standing rules and interpretations. Because the Commission's determination that ISP Internet traffic is interstate traffic is merely a consistent application of standing FCC rules and policy, the cases cited by Bell Atlantic are off-point in this proceeding.

1. Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987), relates to an instance where a **new** rule was promulgated by a federal agency. In the Internet proceeding, the FCC is not contemplating a new rule.
2. Retail, Wholesale, and Department Store Union v. NLRB, 151 U.S. App. D.C. 209 (D.C. Cir. 1972) concerns a "retroactive application of a **change** in policy" (emphasis added). In the Internet proceeding, the FCC is not changing policy.
3. Linkletter v. Walker, 318 U.S. 618 (1965), involved a the retrospective application of a **change** in constitutional interpretation. In the Internet proceeding, the FCC is not altering a prior interpretation.
4. Safarik v. Udall, 304 F.2d 944 (D.C. Cir.), cert denied, 371 U.S. 901 (1962), stands for not giving retroactive effect to a decision **overruling a former decision**. In the Internet proceeding, the FCC is not overruling a former decision.
5. McDonald v. West, 653 F.2d 1035 (5th Cir. 1981), involved the interpretation of an administrative regulation that was a **reversal of a well-established agency practice**. In the Internet proceeding, the FCC is not reversing a well-established agency practice.
6. Beazer East, Inc. v. EPA, 963 F.2d 603 (3rd Cir. 1992), is cited by Bell Atlantic as stating that courts will not allow retroactive application of an

agency adjudication where doing so would result in "manifest injustice." However, Beazer upheld a retroactive application and only included this phrase to limit the general rule that "nothing in the [Administrative Procedures Act] prohibits an agency from adopting or revising an interpretation of a regulation that has been properly promulgated in adjudication and applying that interpretation retroactively" 963 F. 2d 603, 609.